Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN E. HARRISON AND LIGHT & HARRISON, P.C.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE UNITED STATES,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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40 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fourth Circuit Court of Appeals failed to follow this Court's decision in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), when the Court of Appeals reversed the entry of summary judgment against a party who, in opposition to the motion showing that the statute of limitations had run and that no facts existed to support tolling the statute, offered no evidence in opposition because its papers were stricken from the record by the District Court, and it did not appeal from the decision striking the opposition.

II. Whether, in the absence of a genuine issue as to any material fact with respect to tolling the statute of limitations, an appellate court may reverse the entry of summary judgment in favor of defendants as to whom the statute has run and remand for further development of the facts, where the parties have had adequate opportunity for discovery, and the facts relevant to tolling are not complex or technical.

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LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit are as follows:

Federal Deposit Insurance Corporation
John E. Harrison
Light & Harrison, P.C.
Terry B. Light
Charles P. Cocke
Julius F. Fogel
Lloyd B. Ramsey
Preston L. Walker
John E. Harn, II
Richard E. Blair

There are no parent or subsidiary companies to be listed pursuant to Rule 29.1 of the Rules of the United States Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John E. Harrison and Light & Harrison, P.C. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The October 15, 1993 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 7 F.3d 396 (4th Cir. 1993), and is reprinted in the Petitioners' Appendix at Appendix A. The prior decision of the United States District Court for the Eastern District of Virginia, entered May 1, 1992, is unreported. The May 1, 1992 order is reprinted in the Petitioners' Appendix at Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 15, 1993. The Fourth Circuit denied

a timely petition for rehearing on December 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331, 1345 and 12 U.S.C. § 1819.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Federal Rule of Civil Procedure 56(b); (c); (e):

(b) A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

(e) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

Respondent, the Federal Deposit Insurance Corporation ("FDIC"), sued John Harrison, Light & Harrison, P.C., and other former directors or outside counsel of McLean Savings & Loan Association ("MSL") and its mortgage banking subsidiary, McLean Financial Corporation ("MFC") in the United States District Court for the Eastern District of Virginia. The FDIC alleged that the directors were negligent and breached fiduciary

duties in approving certain loans from MSL to MFC, and that outside counsel was negligent in failing to warn about regulatory violations allegedly associated with the loans.

The District Court granted the motions of petitioners and others for summary judgment on grounds that the statute of limitations had run. At that time, the FDIC's opposition papers were not before the District Court because the FDIC's late-filed opposition had been stricken. The FDIC appealed the decision granting summary judgment against it, but did not appeal the order striking its opposition. The Fourth Circuit reversed in part and remanded to allow the FDIC to offer evidence in support of tolling the statute of limitations, and in support of a contract basis for its claims against attorney defendants, but made no mention of the lack of a record in opposition to summary judgment before the District Court or on appeal.

MSL AND MFC

Founded in 1974, by 1979 MSL ranked among the 200 most profitable savings and loans in the country. Its mortgage banking subsidiary became extraordinarily successful shortly after being established in 1981. By mid-1985, however, economic and regulatory changes in the mortgage banking industry prompted MSL to direct a change-over of MFC to a smaller, more localized retail mortgage seller.

After MFC's poor financial performance during its 1985-86 fiscal year, MSL commissioned a review of MFC's profitability during the first six months of the 1986-87 fiscal year. That review by MSL's outside auditors indicated MFC had turned the corner and was operating at a profit. Shortly thereafter, however, MSL's internal auditors identified significant losses at MFC, causing MSL to move quickly to end further loans and to sever its ownership interest in MFC. MFC filed for bankruptcy in August 1987.

PROCEEDINGS BELOW

Respondent FDIC commenced this action on November 29, 1991. On January 10, 1992, the FDIC filed an amended complaint against certain additional former directors and outside counsel of MSL and MFC, including petitioners. The FDIC did not charge any defendant with any act of fraud or concealment of wrongdoing with respect to the loans and dividends that were the subject of its lawsuit. [1] Instead, the FDIC's pleadings made clear that the loans were reflected on the books of MSL, and that whatever the acts were that the FDIC maintained constituted wrongdoing — the amended complaint did not set forth such acts except in extremely general language that failed to distinguish among the various classes of defendants — those acts were known about contemporaneously by state and federal regulators, as well as some nonculpable shareholders.

Beginning shortly after the FDIC filed its amended complaint, the District Court entered a series of orders directed at the FDIC's failure to set forth the nature of its claims. On February 14, 1992, Magistrate Judge Brinkema ordered the FDIC to file a more definite statement, ruling that the first 48 paragraphs of the 93-paragraph complaint were "completely vague." Joint Appendix before the Court of Appeals ("J.A.") at 13-14 (Docket No. 48).

Pursuant to Magistrate Judge Brinkema's order, the FDIC filed a 73-page, 217-paragraph, second amended complaint. On February 28, 1992, Judge Bryan struck the second amended complaint, ruling that in its latest pleading, the FDIC had "gone off on a real tangent here and multiplied this case without in any way being more specific," and again ordered the FDIC to file a more definite statement. J.A. at 18 (Docket No. 85).

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[1] Thus, the statement in the Fourth Circuit's opinion below that the FDIC alleged fraudulent misconduct by the defendants, *FDIC* v. *Cocke*, 7 F.3d at 399, is false.

Pursuant to Judge Bryan's order, the FDIC filed a 118-page, 301-paragraph More Definite Statement in which the FDIC persisted in lumping all classes of defendants into single counts supported only by general, conclusory factual allegations. On April 3, 1992, following a deposition pursuant to Fed. R. Civ. P. 30(b)(6) in which the FDIC asserted that it had no knowledge of the facts supporting its charges against the defendants, Judge Ellis directed the FDIC to go beyond its More Definite Statement and "prepare a document identifying with respect to each enumerated paragraph of the Amended Complaint, and with specific reference to each defendant, the factual basis for the paragraph and persons with actual knowledge of those facts." J.A. at 137.

Pursuant to Judge Ellis' order, the FDIC filed a 136-page "Disclosure of Additional Facts" that still failed to specify the specific acts of negligence each defendant was being charged with. On April 24, 1992, Magistrate Judge Sewell ruled that this pleading failed to comply with Judge Ellis' order, and directed the FDIC to file yet another pleading in which the FDIC was, once and for all, to "set forth the facts known to it and upon which it intends to rely in support of *each claim* as to *each defendant*." (Emphasis in original.) J.A. at 33 (Docket No. 260).

On April 10, 1992, petitioners, together with certain other defendants, moved to dismiss or for summary judgment on several grounds, including the statute of limitations. J.A. at 28 (Docket No. 198). Petitioners' motion, supported by affidavits, set forth that the alleged acts of wrongdoing all occurred no later than April 1987, and that under the applicable limitations period, all such claims had become stale prior to the federal takeover of MSL. Petitioners' motion alerted the District Court to the absence of any facts otherwise indicating that any of the FDIC's claims were time-barred. At the hearing on the motion, petitioners also pointed out to the court that the FDIC's pleadings and other facts properly before the court on summary judgment precluded any possibility of tolling of the statute of limitations, given the contemporaneous knowledge by both the

regulators and nonculpable shareholders of the facts alleged to constitute wrongdoing. J.A. at 64-65.

After receiving an extension of time in which to oppose the motion, the FDIC failed to file a timely opposition. On April 28, 1992, Magistrate Judge Brinkema struck the FDIC's untimely filing, citing "a well documented history of the Plaintiff failing to meet its deadlines, of the Plaintiff not complying with the Orders of the Court that have set deadlines[.]" J.A. at 179, 206. On May 1, 1992, Judge Bryan upheld the magistrate judge's order striking the FDIC's papers. J.A. at 118.

Also on May 1, 1992, Judge Bryan granted petitioners' and other defendants' motions for summary judgment, and dismissed the complaint as to them. At the hearing on the motion, despite having no opposition papers before the court, the FDIC argued that the statute of limitations should be tolled under state and federal law due to facts allegedly giving rise to equitable tolling. J.A. at 85-87. However, in granting summary judgment, Judge Bryan ruled that the facts alluded to by the FDIC (but not before the court) were not the type of facts that would give rise to tolling. J.A. at 115.

On May 12, 1992, the FDIC moved for reconsideration of the order granting summary judgment and dismissing the complaint, submitting in support of its motion the same opposition papers previously stricken from the record. J.A. at 37 (Docket No. 309). In opposition to the FDIC's motion, petitioners noted that virtually all of the opposition papers consisted of unsworn minutes and other hearsay documents that did not constitute proper evidence on summary judgment, and that rather than offering any evidence as to concealment, the documents merely confirmed that the regulators were fully aware of the facts alleged to constitute wrongdoing, and that the losses allegedly resulting from the loans to MFC were fully disclosed to shareholders. J.A. at 37 (Docket No. 318). On May 15, 1992, Judge Bryan denied the FDIC's motion for reconsideration. J.A. at 38 (Docket No. 323).

On August 13, 1992, the FDIC appealed the District Court's decision to the Fourth Circuit Court of Appeals. The FDIC did not, however, appeal from the Judge Bryan's or Magistrate Judge Brinkema's orders striking the FDIC's opposition papers. As a result, the Fourth Circuit had absolutely no record before it in support of any tolling theory.

Nevertheless, in its principal brief, the FDIC relied extensively on its opposition papers that had been struck below. Despite objection by petitioners to the absence of a record, on October 15, 1993, a three-judge panel of the Fourth Circuit reversed the District Court, directing that on remand, the court inquire into whether or not facts might exist in support of tolling by virtue of equitable estoppel under state law. Ignoring the complete lack of a record on summary judgment as to any tolling theory, the Fourth Circuit held that "the District Court erred by rejecting outright the application of a tolling mechanism to the facts of this case." *FDIC* v. *Cocke*, 7 F.3d at 402.

While the Fourth Circuit was clear in attributing to the FDIC the burden of proof to show equitable estoppel, the Court of Appeals instructed the District Court to ferret out the existence of such facts by determining "the extent to which equitable estoppel tolls Virginia's one-year statute of limitations," *FDIC* v. *Cocke*, 7 F.3d at 403, and made no mention whatsoever of the absence of a record in support of the tolling issue as to which the FDIC bore the burden of proof, of the striking of the FDIC's opposition papers, or of the FDIC's failure to appeal the order striking its opposition. [2]

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[2] The Fourth Circuit also reversed the district court's ruling that the limitations period had run as to the attorney defendants, essentially directing the district court to do what the FDIC would not do in its myriad pleadings below, i.e., sort out which of the FDIC's allegations stemmed from contractual services provided by Harrison or Light & Harrison, P.C. (to which a longer limitation period applied), as opposed to services provided by Harrison as a director of MSL. But the affidavit of MSL's former president offered by petitioners in support of summary judgment uncontrovertedly established that no legal services were requested or provided in

(footnote continues)

The Fourth Circuit denied appellees' and appellant's petitions for reconsideration and suggestion for rehearing en banc on December 21, 1993. Pursuant to 28 U.S.C. § 1254(1), petitioners now seek certiorari review of this action, on the basis that the Fourth Circuit improperly ignored the complete absence of any evidence on the issues for which the FDIC bore the burden of proof, in contravention of the provisions of Fed. R. Civ. P. 56 and the holding of this Court in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT HAS SO FAR DEPARTED FROM THE HOLDINGS OF THIS COURT AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioners' burden on summary judgment was to show that no genuine dispute existed as to the expiration of limitations periods, which petitioners undeniably did.

However, because the FDIC bore the burden of proof as to whether the limitations period was tolled, petitioners were not required to disprove the FDIC's case as to tolling. Instead, petitioners were only required to "poin[t] out to the District Court . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 324, and to do so by offering more than conclusory assertions as to the absence of such evidence. *Celotex*, 477 U.S. at 328 (White, J., concurring).

This petitioners also undeniably did, by pointing out that under any theory of tolling, the FDIC would need to prove that

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(footnote continued)

connection with the loans and dividends that were the subject of the FDIC's complaint. In the face of such a showing, the FDIC was required to come forward with some evidence to the contrary. The FDIC's complete failure to do so mandated the entry of summary judgment on the attorney claims.

the defendants concealed the cause of action, yet such a showing of concealment was rendered impossible by virtue of the FDIC's own pleadings which set forth the regulators' contemporaneous discovery of the alleged wrongdoing during the course of the regular FHLBB examinations of MSL and the regulators' "warnings" to defendants of the alleged regulatory violations prior to the expiration of the statute of limitations. [3]

Petitioners also pointed out to the District Court that defendants' alleged wrongdoing was not concealed from independent shareholders. Thus, petitioners submitted with their motion for summary judgment MSL's public financial statements disclosing MSL's significant loans to MFC and losses incurred thereby. Petitioners also noted in argument before the District Court that the FDIC's own pleadings and deposition testimony identified at least one former officer and shareholder of MSL as not only "not responsible for the claims that we brought," but also someone whom the FDIC specifically designated as knowledgeable about virtually every transaction or occurrence alleged to give rise to liability in the case. *See* Opposition to Plaintiff's Motion to Reconsider, J.A. at 37 (Docket No. 318), Mem. at 8-9 n.2. [4]

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[3] *See*, e.g., More Definite Statement ¶¶ 65, 126(1), 137, 139(g), 170(e). Under long-established authority within the Fourth Circuit, as well as more recent authority arising out of similar lawsuits brought by the FDIC or the Resolution Trust Corporation, such contemporaneous knowledge by the regulators precludes the possibility of showing concealment or similar wrongful conduct required to toll the statute of limitations. *See White* v. *FDIC*, 122 F.2d 770, 773 (4th Cir. 1941) (no basis to toll statute of limitations when regulators who had power to take corrective action had full knowledge of the transaction), *cert. denied*, 316 U.S. 672 (1942); *FDIC* v. *Dawson*, 4 F.3d 1303, 1312-13 (5th Cir. 1993) (at the same time directors were allegedly negligent in failing to supervise lending functions, "the board never concealed its 'serious deficiencies' from examination by the OCC or anyone else").

[4] Such knowledge by shareholders precluded any possibility of tolling. *White* v. *FDIC*, 122 F.2d at 773, 776; *Armstrong* v. *McAlphin*, 699 F.2d 79, 88

(footnote continues)

At this point, the FDIC was *required* to come forward with sufficient evidence to defeat summary judgment on the statute of limitations. [5] Instead the FDIC came forward with nothing. Its entire opposition papers were stricken from the record as a result of its own repeated failure to set forth the basis for its case below; and the FDIC failed to take an appeal from the striking of its opposition. Moreover, as petitioners argued below, even had the FDIC's papers not been struck, they would still have amounted to no evidence whatsoever in support of tolling, since

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(footnote continued)

(2d Cir. 1983) (tolling due to "adverse domination" rejected where shareholders knew from financial statements and other available information of significant financial problems, and thus should have discovered any wrongdoing).

[5] Upon the defendants' showing that the limitation period had expired, the FDIC bore the burden to offer evidence showing that the limitations period should be tolled. *RTC* v. *Seale*, 13 F.3d 850 (5th Cir. 1994) (On summary judgment, "[d]efendants challenged the RTC to prove regulatory violations and adverse domination. They argued that naked assertions would not suffice [under *Anderson* and *Celotex*]. These cases demonstrate that the RTC [which offered no proof of regulatory violations or domination in opposition to summary judgment] did not meet its burden."); *Blue Cross & Blue Shield of Alabama* v. *Weitz*, 913 F.2d 1544, 1552 n.13 (11th Cir. 1990) ("Once a defendant shows that the applicable statute of limitations bars the claims, the burden shifts to the plaintiff to demonstrate that an exception or tolling provision applies."); *Hamilton* v. *Komatsu Dresser Indus., Inc.*, 964 F.2d 600, 606 (7th Cir. 1992) (Since "the burden [was] on the plaintiff to present facts which, if true, would justify equitable modification of the statute of limitations . . . they may not rest on the pleadings but must affirmatively demonstrate, by setting forth specific facts, that there is a genuine issue of material fact for trial."), *citing Celotex*, *cert. denied*, 121 L.Ed.2d 244; *Mack* v. *Great Atlantic & Pacific Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989) ("Thus, to escape the swing of the summary judgment axe, Mack had the burden of showing . . . [facts sufficient] to toll the prescriptive period[.]". *See also RTC* v. *Holmes*, 839 F. Supp. 449, 452 (S.D. Tex. 1993) ("In this case defendants bear the summary judgment burden on their affirmative defense of limitation. RTC can defeat summary judgment if it raises a genuine issue of fact as to whether the adverse domination of the . . . board tolled limitations.").

they did not evidence any acts of concealment of wrongdoing, [6] were almost without exception unsworn hearsay materials that did not constitute proper summary judgment evidence, and were absolutely contradicted by the FDIC's own pleadings that demonstrated regulators' and shareholders' extensive and contemporaneous knowledge of the facts allegedly giving rise to the FDIC's cause of action.

The record before the Fourth Circuit was of course no different than that before the District Court, and allowed for no different result. The Court of Appeals could not consider pleadings that were stricken below and thus not a part of the record. *See Town of River Junction* v. *Maryland Cas. Co.*, 110 F.2d 278 (5th Cir. 1940), *cert. denied*, 310 U.S. 634; Wright, Miller & Kane, *Federal Practice and Procedure*, § 2722 (1983 and 1992 Supp.). [7] The FDIC's pleadings in response to summary judgment were stricken and thus not a part of the record and the FDIC never pursued any appeal of the District Court's order striking its pleadings. [8] Absent evidence supporting the FDIC's position —

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[6] At most the FDIC's papers merely sought to demonstrate a form of non-intentional equitable estoppel by virtue of the MSL directors' assurances to the FHLBB that (in response to a completely unrelated regulatory violation pertaining to growth restrictions) MSL was sufficiently sound to preclude imposition of formal regulatory restrictions. Yet the Fourth Circuit correctly recognized that absent concealment of the alleged wrongdoing, such conduct is inadequate to support tolling.

[7] The evidence to meet the burden as to tolling must be in the record before the district court. *Bonilla-Aviles* v. *Southmark San Juan, Inc.*, 992 F.2d 391, 393 (1st Cir. 1993) ("The plaintiffs here contend, as they did in the district court, that three letters tolled the statute. These letters were referenced and apparently attached to motions the plaintiffs filed, but the letters were, nevertheless, not part of the record before the district court . . . [because defendants' showing as to the expiration of the limitation period shifted the burden to plaintiffs to show tolling], their failure to introduce into the record the letters . . . was fatal to the claim.").

[8] The FDIC waived any appeal of the order striking its opposition papers. That order is not mentioned in any of the three notices of appeal filed by the FDIC with the Fourth Circuit on August 13, 1992, August 20, 1992 and September 17, 1992; nor is it contained in the two Docketing

(footnote continues)

and certainly factual representations made by FDIC counsel either below or on appeal do not constitute "evidence" cognizable by a court, *see* Wright, Miller & Kane, *Federal Practice and Procedure* § 2723 (1983), the Court of Appeals should have affirmed the District Court's decision.

Yet the Fourth Circuit ignored the complete absence of a record in favor of any tolling theory. Instead, confused about the nature of the FDIC's allegations, [9] the Court of Appeals reversed and remanded with instructions for the District Court to delve into the possibility that facts might exist to show that the defendants intentionally concealed some alleged wrongdoing from all parties who might otherwise have "discover[ed] the wrongdoing and [been able to] "bring action to address it." *FDIC* v. *Cocke*, 7 F.3d at 402. [10]

(footnote continued)

Statements filed by the FDIC on August 20, 1992 and September 29, 1992; nor is the subject matter even mentioned as an issue on appeal in either the Docketing Statement or the Statement of Issues in Appellant's Brief; nor was the subject in fact briefed by the FDIC or argued at oral argument. Taken together, this constitutes a waiver of this issue on appeal. *See, Piazza* v. *Aponte Rogue*, 909 F.2d 35 (1st Cir. 1990); *Pedicord* v. *Swenson*, 431 F.2d 92 (8th Cir. 1970). Thus, the propriety, *vel non* of the District Court's order striking the FDIC's opposition papers was never placed before the Court of Appeals by the FDIC; and the Fourth Circuit, in reviewing the grant of summary judgment, was required to accept the same record that was available to the trial court.

[9] Most critically, the Court of Appeals was of the mistaken view that the FDIC had alleged fraudulent conduct. *FDIC* v. *Cocke*, 7 F.3d at 399. Allegations of fraud intimate concealment; and a court might very properly be reluctant to preclude any notion of tolling absent a clear record showing that the alleged wrongdoing was not concealed. But in this action, no acts of fraud were ever alleged by the FDIC, against petitioners or any other defendants.

[10] The Court of Appeals concluded that the District Court erred as a matter of law by "rejecting outright the application of a tolling mechanism to the facts of the case." *FDIC* v. *Cocke*, 7 F.3d at 402. The District Court may have rejected the applicability of the FDIC's particular version of "adverse domination" — as did the Fourth Circuit — but as the hearing

(footnote continues)

The Fourth Circuit's decision was in contravention of this Court's holding in *Celotex*, and indeed, of the Fourth Circuit's own decisions following *Celotex*. Instead, the Court of Appeals reverted to its pre-*Celotex* practice of insisting that the trial court initiate its own inquiry into the facts for the purpose of guiding the plaintiff toward the factual showing necessary to resist summary disposition. *See Felty* v. *Graves-Humphreys Co.*, 785 F.2d 516, 519-20 (4th Cir. 1986).

In the posture before which the case sat below, with petitioners having fully met their burden on summary judgment and with no contrary evidence before it whatsoever in support of tolling due to conscious acts by the FDIC, the Fourth Circuit was not free to direct further fact-finding. *Celotex* and Rule 56(c) mandated that summary judgment be affirmed. Under the circumstances, the Fourth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." *See* Rule 10.1(a) of the Rules of the Supreme Court of the United States.

CERTIORARI SHOULD BE GRANTED TO FORESTALL THE WIDENING OF THE EXCEPTION TO *CELOTEX* ALLOWING FOR FURTHER DEVELOPMENT OF FACTS EVEN WHEN SUMMARY JUDGMENT IS PROPERLY SUPPORTED AND UNOPPOSED.

Under this Court's prior decisions, only one very limited exception might allow a court to require further development of the facts in the face of a properly supported but unopposed motion for summary judgment. Thus, "appellate courts, including the Supreme Court, have reversed summary judgments where the lower court "record[s] ha[ve] not been sufficiently

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(footnote continued)

transcript reflects, the District Court heard both parties' arguments as to the applicability and evidence of tolling both under state and federal tolling law, and concluded that the facts supporting tolling simply were not present before the court.

developed to allow the court[s] to make . . . fully informed decision[s] on particularly difficult and far reaching issues.'" *Anderson* v. *Hodel*, 899 F.2d 766, 770 (9th Cir. 1990), *quoting* Schwarzer, "Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact," 99 F.R.D. 465, 475 (1984). [11]

Nothing was complicated about the FDIC's inability to come forward with some facts evidencing acts of concealment sufficient to toll the statute of limitations. After having been given numerous opportunities to do so by the District Court, the FDIC came forward with no such facts, because it could not do so — instead, as its own pleadings demonstrated, the facts were not concealed from anyone.

Under the circumstances, by insisting on additional proceedings to develop facts as to concealment, the Fourth Circuit threw open the door left slightly ajar after *Anderson* v. *Liberty Lobby* and *Celotex*. If the appellate courts are always free to insist on the development of further facts despite the complete absence of the technical or complex factual disputes or competing inferences relied on in *Kennedy* v. *Silas Mason Corp.*, then the rule of *Celotex* and the language of Fed. R. Civ. P. 56(c) become meaningless. [12]

Such a result has wide-ranging implications. Today, untold numbers of professional liability cases are being advanced in the federal courts by the FDIC and its sister agency, the Resolution Trust Corporation, each one seeking to breath new life into long-

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[11] *See also Anderson* v. *Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), *citing Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 257, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948).

[12] Such reversions to pre-*Celotex* requirements by means of remands for further fact-finding may be occurring with some frequency. *See Norman* v. *Taylor*, 9 F.3d 1078, 1083 (4th Cir. 1993) (Luttig, Circuit Judge, dissenting) (although district court admonished *pro se* litigant to set out specific facts in dispute, matter remanded due to district court's failure to directly pose question to party as to key issue in case), *vacated, rehearing in banc granted*, 1994 U.S. App. LEXIS 412.

stale claims arising out of financial institutions' losses following the collapse of the residential real estate market in the mid- to late-1980's. After the initial, highly publicized cases involving allegations of fraud, these cases have almost uniformly settled into repetitious allegations of garden-variety negligence, in which, time after time, the FDIC or the RTC fails to come forward with any evidence of concealment or similar conduct sufficient to toll the statute of limitations. [13]

In each of these cases, motions for summary judgment serve as a proper means to bring to an end a years-long, Kafkaesque experience in which former directors and professionals live under a cloud while the agency investigates potential wrongdoing without disclosing any specific charges, then brings suit based on only the most general allegations of misconduct, insisting that "the defendants know what misdeeds they have done." Ultimately, if all these cases must be tried, the FDIC's and RTC's empty bags of evidence will be exposed. But then what purpose is possibly served by Rule 56?

A federal agency may care relatively less about whether litigation in the courts ever comes to an end — there are always more cases, and legions of lawyers to staff them. The defendants in cases such as *FDIC* v. *Cocke*, however, are not so seemingly immortal. For such defendants, life itself will come to an end sooner than these lawsuits over loans made long ago. Absent facts that truly fit within the limited exceptions for complex litigation, summary judgment should be mandatory when a properly supported motion is met with the type of response the FDIC provided in this case. This Court should take the opportunity to make clear the limits of the exception, and the otherwise mandatory nature of Fed. R. Civ. P. 56(c).

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[13] *See, e.g., RTC* v. *Everhart*, 837 F. Supp. 155, 158 (E.D. Va. 1993) ("RTC admitted during oral argument that it can offer no evidence that the defendants concealed their alleged wrongdoing[.]").

Accordingly, petitioners seek review in this Court to reverse the Fourth Circuit's erroneous opinion and reinstate the summary judgment granted by the District Court below.

CONCLUSION

For all the foregoing reasons, the Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX A

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, in its Corporate capacity as an instrumentality of the United States, *Plaintiff-Appellant,* v. CHARLES P. COCKE, *Defendant-Appellee.*	No. 92-1987
FEDERAL DEPOSIT INSURANCE CORPORATION, in its Corporate capacity as an instrumentality of the United States, *Plaintiff-Appellant,* v. JULIUS F. FOGEL, *Defendant-Appellee.*	No. 92-1994
FEDERAL DEPOSIT INSURANCE CORPORATION, in its Corporate capacity as an instrumentality of the United States Receiver of McLean Savings and Loan Association, *Plaintiff-Appellant,* v. LLOYD B. RAMSEY; PRESTON L. WALKER; RICHARD E. BLAIR; JOHN E.	No. 92-1999

HARN, II; TERRY B. LIGHT; JOHN E. HARRISON; LIGHT & HARRISON, PC,

Defendants-Appellees,

and

THOMAS J. LEONARD, III; FRANK M. HOWARD; JULIUS F. FOGEL,

Defendants.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Chief District Judge; Claude M. Hilton,
District Judge; Albert V. Bryan, Jr., Senior District Judge.
(CA-92-350-A, CA-92-496-A, CA-91-1773-A)

Argued: May 6, 1993

Decided: October 15, 1993

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge,
and BUTZNER, Senior Circuit Judge.

Affirmed in part, reversed in part, and remanded by published opinion. Chief Judge Ervin wrote the opinion, in which Judge Murnaghan and Senior Judge Butzner joined.

COUNSEL

ARGUED: Richard Joseph Osterman, Jr., Senior Counsel, FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C., for Appellant J. Jonathan Schraub, MELROD, REDMAN & GARTLAN, P.C., Washington, D.C.; Thomas L. Appler, MCGUIRE, WOODS, BATTLE & BOOTHE, McLean, Virginia; Douglas Frank Curtis, MILLER, CASSIDY, LARROCA & LEWIN, Washington, D.C., for Appellees. **ON BRIEF:** Ann S. DuRoss, Assistant General Counsel, Robert D. McGillicuddy, Deputy Senior Counsel, Marta W. Berkley,

Charles McDonald, Professional Liability Claims Section, FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C., for Appellant. Danny M. Howell, Niccolo N. Donzella, MELROD, REDMAN & GARTLAN, P.C., Washington D.C.; Randall J. Turk, MILLER, CASSIDY, LARROCA & LEWIN, Washington, D.C.; William T. Freyvogel, ADAMS, PORTER & RADIGAN, LTD., McLean, Virginia, for Appellees.

OPINION

ERVIN, Chief Judge:

The Federal Deposit Insurance Corporation ("FDIC"), acting as receiver of McLean Savings & Loan Association ("McLean"), elected to proceed with a breach of duty action against various parties affiliated with the savings and loan. The district court summarily disposed of all the FDIC's claims as untimely filed under the applicable Virginia [1] statute of limitations. This appeal presents the issue whether federal or Virginia law may operate to toll the running of the statute of limitations on any of the FDIC's claims. Concluding that Virginia's equitable estoppel doctrine could toll the running of the statue of limitations making some or all of the FDIC's claims timely, we reverse the district court's dismissal of the claims on the basis of the running of the statute of limitations. To the extent that individual defendants contend that action against them is inappropriate on grounds other than the statute of limitations, we will discuss their situations in turn.

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[1] Because McLean was incorporated and operated under the laws of Virginia, the state's laws also govern the nature and viability of any tort actions against McLean directors or affiliates.

I

The issues raised by this appeal revolve largely around interpretation and application of law; therefore, only a limited familiarity with the facts is necessary. McLean was a state-chartered, federally-insured stock savings association located in McLean, Virginia. By participating in the federal insurance program, McLean subjected itself to federal examinations and, in troubled times, oversight. For several years, McLean operated without incident, making traditional home mortgages. As interest rates became more competitive, McLean sought additional ways to generate revenues, however. In 1981 McLean formed McLean Financial Corporation ("MFC"), a financial service subsidiary to McLean, to originate, broker, buy, sell, and service residential real estate loans. Many of McLean's directors also sat on the board of MFC. [2]

MFC, though initially very profitable, began to suffer losses in 1985, prompting McLean to attempt to bolster the subsidiary's slumping financial performance. McLean began making unsecured loans to MFC, allegedly without seeking the required regulatory approval. In 1986 the McLean board also approved the payment of dividends to McLean shareholders despite the

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[2] Lloyd B. Ramsey was a director of McLean from 1977 to 1988 and Chairman of the Board of Directors from 1977 to 1986. Preston L. Walker was a director of McLean from 1977 to 1988, as well as a director of MFC from 1981 to 1987. Richard E. Blair served as a McLean director from 1977 to 1988 and as a MFC director from 1982 to 1987. John E. Harn, II was a director of McLean from 1980 to 1988 and a director of MFC from 1981 to 1987. Julius F. Fogel was a director of McLean from 1977 to 1987. Charles P. Cocke was a McLean director from 1977 to 1988 and a director of MFC from 1982 to 1987. John E. Harrison served as a director of McLean from 1977 to 1988 and Chairman of MFC's Board of Directors from 1982 to 1987. Harrison also was one of two principles in the law firm of Light & Harrison, P.C., which served as general counsel to both McLean and MFC from 1981 to 1987.

institution's financial inability to make such payments. This misconduct together with other asserted fraudulent and unscrupulous transactions propelled McLean into receivership on July 8, 1988. [3]

As receiver the FDIC retained any potential claims the corporation could have maintained against its former directors, officers, or attorneys for their breaches of duty owed to the corporation. Therefore, on November 29, 1991, the FDIC brought the first of three lawsuits alleging breaches of duty based on the conduct involving the management of McLean and MFC.[4] The first action was filed against Thomas J. Leonard, III, Frank M. Howard, [5] Lloyd B. Ramsey, Preston L. Walker, and Richard E. Blair—former directors of McLean and MFC—for breach of their fiduciary duty of care to the corporations for which they served. Amending the complaint, the FDIC added similar charges against John E. Harn, II, McLean's president; John E. Harrison, McLean director and attorney; Terry B. Light, McLean attorney; and Light & Harrison, P.C., general counsel to McLean. After failed attempts to add additional directors through amendment, the FDIC filed separate complaints against Charles P. Cocke and Julius F. Fogel. The FDIC entered into tolling agreements with the directors and attorneys named in the three actions to establish the filing of its complaints on June 5, 1991, for purposes of invoking the statute of limitations.

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[3] On July 8, 1988, the Federal Savings & Loan Insurance Corporation ("FSLIC") was appointed as receiver. The FSLIC then took possession of all the assets and obligations of both McLean and its subsidiary MFC, including potential claims against former directors, officers, and attorneys. The FDIC became the successor-in-interest to these claims upon the dissolution of the FSLIC pursuant to the Financial Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 1821a(a).

[4] The last act of misconduct allegedly occurred in April 1987. The FDIC asserts generally that when the actions giving rise to its complaints occurred, McLean was dominated and controlled by its directors and officers, some of whom also controlled MFC.

[5] Howard and Frank were dismissed from this appeal on October 8, 1992 and are not party to the current proceedings. *FDIC* v. *Ramsey*, No. 92-1996, order at 2 (4th Cir. Oct. 8, 1992).

In the district court, the FDIC claims were maintained as *FDIC* v. *Leonard* (CA-91-1773-A); *FDIC* v. *Cocke* (CA-92-350-A); and *FDIC* v. *Fogel* (CA-92-496-A). Defendants in *FDIC* v. *Leonard* brought a motion to dismiss or alternatively for summary judgement. The district court granted summary judgement for the defendants on the basis that the applicable Virginia statute of limitations had run before the FDIC acquired rights in the cause of action. *See FDIC* v. *Leonard*, No. CA-91-1773-A, orders (E.D. Va. Jul. 20, 1992 & May 2, 1992) (dismissing claims against Thomas J. Leonard, III and Frank M. Howard); order (E.D. Va. May 20, 1992) (dismissing claims against Lloyd B. Ramsey and Preston L. Walker); order (E.D. Va. May 1, 1992) (dismissing claims against Richard E. Blair, John E. Harn, II, Terry B. Light, John E. Harrison, and Light & Harrison, P.C.). The district court, recognizing the factual similarity of *FDIC* v. *Cocke* and *FDIC* v. *Fogel*, dismissed them on the basis articulated in *FDIC* v. *Leonard*. *See FDIC* v. *Cocke*, No. CA-92-350-A, order (E.D. Va. Aug. 12, 1992); *FDIC* v. *Fogel*, No. CA-92-496-A, order (E.D. Va. June 17, 1992). The FDIC appealed the summary disposition of all three cases. We consolidated the cases and deal with them as one in this opinion.

II

A

Federal banking regulation, in an effort to mitigate the costs to the taxpayer of bank and savings and loan failures, permits the FDIC to pursue any claims a corporation might have against its officers or directors once the FDIC becomes receiver of that corporation. *See* 12 U.S.C. § 1821(d); *Texas Am. Bancshares, Inc.* v. *Clarke*, 954 F.2d 329,339 (5th Cir. 1992). These breach of duty causes of action are hybrid in nature—authorized and enabled by state law, but appropriated by the FDIC as a means of redress for violations of various federal banking acts. Therefore, the analysis required to determine the viability of such an action is somewhat tedious, incorporating components

of both state and federal law. The most problematic aspect of these actions is the determination of whether a statute of limitations bars the claim. This determination proves taxing because the applicable state statute of limitations controls whether the action is viable when the right to bring the action inures to the FDIC, while the applicable federal statute of limitations controls whether the action was timely filed.

To determine whether a statute of limitations bars the FDIC's actions in this case, we must first answer the following question: Did the Virginia statute of limitations run between the time the action accrued and the date of receivership? To answer this question, we must determine the applicable Virginia statute of limitations and the effect, if any, of any provisions of Virginia law to toll the running of the statutory period.

The FDIC attempts to add a gloss to our analysis by suggesting that federal law must guide and inform the application of the state statute of limitations. The FDIC cites *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), for this proposition, urging us, in applying the state statute of limitations, to incorporate a uniform federal tolling rule patterned after the doctrine of adverse domination. In *Kimbell Foods* the Supreme Court discussed when federal common law must govern federal actions complicated by state substantive components. The Court noted that

> [t]o resolve this question, we must first decide whether federal or state law governs the controversies; and second, if federal law applies, whether this Court should fashion a uniform . . . rule or incorporate state . . . law.

Id. at 718.

In *Kimbell Foods* the Court was called upon to determine "whether contractual liens arising from certain federal loan programs take precedence over private liens, in the absence of a federal statute setting priorities." *Id.* at 718. The Court held:

> That the statutes authorizing these federal lending programs do not specify the appropriate rule of decision in no way limits the reach of federal law. It is precisely when Congress has not spoken "in an area comprising issues substantially related to an established program of government operation," that *Clearfield* directs federal courts to fill the interstices of federal legislation "according to their own standards."

Id. at 727(quoting *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) and *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1943)) (citations omitted). The Court went on to adopt the states' systems of priority as the governing federal common law. *Id.* at 729.

In this case an extensive program of federal regulation does not enable the FDIC's breach of duty cause of action. Although federal law allows the FDIC, as receiver, to bring McLean's claims, the claims are uniquely state-law causes of action acquired through a wholesale takeover of McLean's assets. If it were not for Virginia common law's prohibition against breaches of fiduciary duty by corporate directors, the FDIC would have no claims to bring. Therefore, this case does not present the situation in which federal statute authorizes and outlines federal activity, but neglects to furnish a crucial provision that would effectuate the federal activity more appropriately.

Under the *Kimbell Foods* analysis, the FDIC has failed to demonstrate the presence of a federal program suffering from the absence of a controlling piece of federal law. Instead, the FDIC wishes to advance a state-law cause of action, and must be governed by the Virginia courts' and legislature's interpretations of that action. *See White* v. *FDIC*, 122 F.2d 770, 774-75 (4th Cir. 1941) (looking to Virginia law to determine whether Virginia's statute of limitations is tolled during period of director wrongdoing), *cert. denied*, 316 U.S. 672 (1942).

B

The FDIC argues on appeal that the district court incorrectly applied Virginia's statute of limitations in two material ways. First, the FDIC contends that the district court chose the incorrect Virginia statutory bar to apply to its breach of duty claims. In addition, the FDIC suggests that the district court erred by not applying, as a matter of federal common law, the doctrine of adverse domination to toll the Virginia statute of limitations for the period of time during which the directors who are defendants in this action controlled McLean's and MFC's boards. Because we reject the FDIC's argument that tolling, in this case, should be governed by federal law, we limit our analysis to the applicable statute of limitations and its ability to be tolled under Virginia law.

Therefore, the first step toward our decision whether a statute of limitations bars the FDIC's action is the determination of what statute of limitations Virginia applies to breach of duty actions. The FDIC disagrees with the decision the district court made to apply Virginia's one-year statute of limitations to its causes of action. Virginia's one-year statute of limitations applies to "[e]very personal action, for which no limitation is otherwise prescribed." Va. Code Ann. § 8.01-248 (Michie 1992). The FDIC argues in favor of Virginia's longer contracts or injury to property statute of limitations. For actions based in contract, the statute of limitations is three years for oral contracts and five years for written contracts. *Id.* § 8.01-246. "Every action for injury to property . . . shall be brought within five years after the cause of action accrues." *Id.* § 8.01-243(B).

The Virginia courts have not addressed directly which statute of limitations applies to a breach of fiduciary duty cause of action. Its courts, however, have refused to apply a contracts statute of limitations to a breach of duty action. *See Winston* v. *Gordon,* 115 Va. 899, 80 S.E. 756, 762 (1914). Eliminating the contracts statute of limitations provided by section 8.01-246, we

still are faced with the decision whether the general one-year or the five-year tort statute of limitations is more appropriate.

The FDIC suggests that the five-year statute of limitations for actions alleging injury to property governs this case because its injury derives from the decline in the value of McLean resulting from the directors' and officers' breach of their duty. The Supreme Court of Virginia has not addressed this issue; however, by looking at the contexts in which the Supreme Court of Virginia has applied section 8.01-243(B), we can logically conclude that the Virginia court would not apply section 8.01-243(B) as the FDIC suggests.

The Virginia court has applied section 8.01-243(B) consistently to those cases that involve one party's actions directly against another party's property. *See, e.g., Bader* v. *Central Fidelity Bank,* Va. , 427 S.E.2d 184, 187 (1993) (holding that section 8.01-243(B) applies to action for conversion of an instrument); *Vines* v. *Branch,* Va. , 418 S.E.2d 890, 894 (1992) (holding that section 8.01-243(B) applies to action for damages resulting from continuous trespass to personal property); *Eagles Court Condominium Unit Owners Ass'n* v. *Heatilator, Inc.* 239 Va. 325, 329, 389 S.E.2d 304, 306 (1990) (holding that section 8.01-243(B) could apply to claim for damages resulting from an allegedly defective product); *Hampton Rds. Sanitation Dist.* v. *McDonnell,* 234 Va. 234, 239, 360 S.E.2d 841, 843 (1987) (holding that section 8.01-243(B) applies to action to recover for damage to property caused by sewer discharge); *Lavery* v. *Automation Management Consultants, Inc.,* 234 Va. 145, 154, 360 S.E.2d 336, 342 (1987) (holding that section 8.01-243(B) applies to action seeking damages for unauthorized use of trade name). In summary, when a defendant's alleged conduct was directed at the plaintiff's property, and not at the plaintiff personally, the conduct constitutes an injury to property governed by section 8.01-243(B). *See Vines,* Va. , 418 S.E.2d at 894; *Pigott* v. *Moran,* 231 Va. 76, 80, 341 S.E.2d 179, 182 (1986).

In the instant case, the action involves the FDIC's allegations against McLean's directors that they breached a duty owed

to McLean to act in its best interests. The FDIC's cause of action arises not merely because of a decline in McLean's property value; many prudent and well-reasoned actions by a corporation's board may cause immediate declines in share value or lead to the disposal of valuable assets. The FDIC maintains the breach of duty action because McLean's board has acted in a manner that purportedly personally wronged McLean; indeed, the availability of a breach duty action derives from the personification of a corporation. Therefore, the one-year personal, not the five-year property, statute of limitations is most appropriate for a breach of duty cause of action, as the district court correctly decided.

Under section 8.01-248's one-year statute of limitations, the FDIC must have acquired its interest in the action within one year from the date the action accrued. If Virginia's statute of limitations runs before the FDIC gained its right to the action through receivership, then the FDIC gained a stale claim and may not pursue it. Although the district court held that the FDIC's claims became stale in just such fashion, the FDIC counters on appeal that the one-year statute of limitations should have been tolled under the doctrine of adverse domination.

Under the doctrine of adverse domination, a statute of limitations is tolled on an action against director/officer misconduct so long as a majority of the board is controlled by the alleged wrongdoers. The doctrine rests on the theory that if the wrongdoers "controlled the corporation through a majority of stock ownership and control of the directorate[,] there [would] consequently [be] no one to sue them." *White* v. *FDIC,* 122 F.2d 770, 775 (4th Cir. 1941), *cert. denied,* 316 U.S. 672 (1942).

Virginia courts have not adopted the doctrine of adverse domination expressly. We, however, may be guided by another approach that Virginia takes to the tolling of a statute of limitations. A Virginia code provision details that

> When the filing of an action is obstructed by a defendant's . . . using any other direct or indirect means to

> obstruct the filing of an action, then the time that such obstruction has continued shall not be counted as any part of the period within which the action must be brought.

Va. Code Ann. § 8.01-229(D) (Michie Supp. 1993). The Supreme Court of Virginia has supplemented this statutory provision by suggesting that the doctrine of equitable estoppel may preclude a defendant from raising expiration of the period of limitations as a defense. *See, e.g., Wilson* v. *Butt,* 168 Va. 259, 190 S.E. 260, 265 (1937); *Sadler* v. *Marsden,* 160 Va. 392, 168 S.E. 357, 360-61 (1933); *City of Bedford* v. *James Leffel & Co.,* 558 F.2d 216, 217-18 (4th Cir. 1977) (construing Virginia law).

Although equitable estoppel in Virginia generally does not require an intentional misrepresentation, *e.g., T . . .* v. *T . . . ,* 216 Va. 867, 872-73, 224 S.E.2d 148, 152 (1976) (applying equitable estoppel to prevent the imposition of the statute of frauds), the Virginia Supreme Court has required intentional conduct to allow the doctrine to toll the running of a statute of limitations. The court held that

> [c]onstructive fraud is not such as will toll the running of the statute of limitations. The character of fraud necessary to toll the statute must be of a variety involving moral turpitude. A defendant must intend to conceal the discovery of the cause of action by trick or artifice and must have thus actually concealed it from the plaintiff in order for the exception to apply.

Richmond Redev. & Hous. Auth. v. *Laburnum Constr. Corp.,* 195 Va. 827, 840, 80 S.E.2d 574, 582 (1954); *see also Hawks* v. *DeHart,* 206 Va. 810, 814, 146 S.E.2d 187, 190 (1966).

Based on these provisions of Virginia statutory and case law, we hold that a statute of limitations is tolled until a person intentionally misled by a putative defendant could reasonably discover the wrongdoing and bring action to redress it. Therefore, we conclude that the district court erred by rejecting outright the application of a tolling mechanism to the facts of this

case. Under Virginia's doctrine of equitable estoppel, however, the FDIC will have to do more than show that all of McLean directors were implicated in the wrongdoing, and that it was unable to sue until it became the corporation's receiver. The FDIC also will have to show that the directors concealed their wrongdoing from McLean, MFC, and their shareholders, the parties from whom the FDIC derived its interest in this lawsuit, during the period after the last act of alleged misconduct until the FDIC became receiver. It will be for the district court, on remand, to determine the extent to which equitable estoppel tolls Virginia's one-year statute of limitations. [6]

III

The FDIC has included McLean's attorneys in its cause of action. On appeal, it asserts two errors in the district court's dismissal of the attorney defendants. First, the FDIC alleges that the district court applied the incorrect statute of limitations to its claims based on attorney malpractice. The district court applied the Virginia one-year statute of limitations to these claims. The Supreme Court of Virginia, however, has held that "actions for legal malpractice are governed by the limitations periods applicable to actions for breach of contract." *See MacLellan* v. *Throckmorton*, 235 Va. 341, 343, 367 S.E.2d 720, 721 (1988); *Oleyar* v. *Kerr*, 217 Va. 88, 90, 225 S.E.2d 398, 400 (1976). In this case either the three- or five-year contract statute of limitations will apply based on a finding as to whether the alleged malpractice was governed by a written or oral contract. To the extent that

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[6] In addition to the issues concerning the Virginia statute of limitations discussed herein, the FDIC argued on appeal the timeliness of its action under the federal statute of limitations. Because the district court limited its rulings to the Virginia statute of limitations, any discussion we would offer on the federal statute of limitations would be advisory in nature. On remand, the district court will have an opportunity to apply the federal statute of limitations; therefore, we refrain from addressing the issue now, assured that, if need be, the district court's reasoned application of the law will provide us a more appropriate means of review.

Harrison's alleged wrongdoing stems from his actions as a director, the one-year statute will apply; to the extent the allegations stem from his service as McLean's attorney, the longer statutory period will apply. The longer period also will apply to Light & Harrison, P.C.

Second, the FDIC alleges that the district court erred in suggesting that the FDIC's claims against Terry B. Light are derivative and therefore barred by the Virginia Code's Professional Corporations chapter. The FDIC claim is without merit. Section 13.1-547[7] of the Professional Corporations chapter clearly maintains the traditional grounds for liability between a member of a professional corporation and her clients, while exculpating a member for the negligent activities of other members of the corporation. Va. Code Ann. § 13.1-547 (Michie 1989). Case law reinforces this concept; construing section 13.1-547, we have noted "that professionals practicing in a professional corporation enjoy limited personal liability for wrongful acts committed by their fellow professionals in the corporation." *Bettius & Sanderson, P.C.* v. *National Union Fire Ins. Co.*, 839 F.2d 1009,

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[7] Section 13.1-547 states:

> The provisions of this chapter shall not be construed to alter or affect the professional relationship between a person furnishing professional services and a person receiving such service either with respect to liability arising out of such professional service or the confidential relationship between the person rendering the professional service and the person receiving such professional service, if any, and all such confidential relationships enjoyed under the laws of this Commonwealth, whether now in existence, or hereafter enacted, shall remain inviolate. A director, officer, agent or employee of a professional corporation shall not, by reason of being any director, officer, agent or employee of such corporation, be personally liable for any debts or claims against, or the acts or omissions of the corporation or of another director, officer, agent or employee of the corporation, but the corporation shall be liable for the acts or omissions of its director, officer, agents, employees and servants to the same extent to which any other corporation would be liable for the acts or omissions of its directors, officers, agents, employees and servants while they are engaged in carrying on the corporate business.

Va. Code Ann. § 13.1-547 (Michie 1993).

1013 (4th Cir. 1988). Light will be liable to the FDIC only to the extent that he is responsible for Light & Harrison, P.C.'s share of the liability, if any. Light cannot be held personally liable if he was not personally responsible for any of the work done for McLean. Therefore, the district court's dismissal of Light on this alternate basis was correct.

IV

Two defendants, John E. Harrison and Light & Harrison, P.C., made a motion to us to dismiss the FDIC's appeal as to them on the ground that they have been released from the cause of action. The FDIC released two other defendants, Thomas J. Leonard, III and Frank M. Howard, pursuant to settlement agreements that also released Leonard's and Howard's "heirs, assigns, successors, and any former or current agents, employees, servants, affiliates, attorneys and other representatives," from all claims which the FDIC "may now have, or may ever have had against [Leonard or Howard] for damages . . . alleged to have been suffered or to be suffered by [McLean] or MFC . . . ." The release operates to relieve Harrison and Light & Harrison, P.C. of liability only as to advice and services rendered under the direct employ of Leonard or Howard. To the extent that the FDIC alleges liability against Harrison and Light & Harrison, P.C. based on their own relationships with McLean and not through the relationship of Leonard and Howard, Harrison and Light & Harrison, P.C. are not released. Therefore, we conclude dismissal would not be proper and so order.

V

Julius F. Fogel raises the following issue unique to him. He asserts that the FDIC failed to comply with its tolling agreement with him by not bringing action against him on or before February 24, 1992. After reviewing the tolling agreement in question, the entries in the district court's docket, and the parties' briefs and arguments on this point, we conclude that Fogel should be

dismissed on the basis of the FDIC's failure to comply with the tolling agreement.

VI

In summary, we affirm the district court's decision to apply Virginia's one-year statute of limitations to the actions against Charles P. Cocke, Lloyd B. Ramsey, Preston L. Walker, Richard E. Blair, John E. Harn, II, and John E. Harrison, in his capacity as a director, but reverse the district court's determination outright that no tolling principle affects the running of that statutory period. We reverse the district court's application of a one-year statute of limitations to the actions against John E. Harrison in his capacity as McLean's attorney and against Light & Harrison, P.C., and we deny the motion to dismiss of Harrison and Light & Harrison, P.C. We affirm the dismissal of all proceedings against Julius F. Fogel and Terry B. Light. In so doing, we remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

APPENDIX B

FILED: December 21, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1987(L)
(CA-92-350-A)

FEDERAL DEPOSIT INSURANCE CORPORATION, in its Corporate capacity as an instrumentality of the United States,

Plaintiff-Appellant,

versus

CHARLES P. COCKE,

Defendant-Appellee.

On Petition for Rehearing With Suggestion for Rehearing In Banc

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Appellees John E. Harrison and Light & Harrison, P.C. filed a petition for rehearing with suggestion for rehearing in banc. Appellant filed a petition for rehearing with suggestion for rehearing in banc and appellees filed answers to appellant's petition. No member of the Court requested a poll on the suggestions for rehearing in banc, and the original judicial panel voted to deny rehearing in banc.

The Court denies both petitions for rehearing with suggestions for rehearing in banc.

Entered at the direction of Chief Judge Ervin with the concurrence of Judge Murnaghan and Senior Judge Butzner.

For the Court

/s/ BERT M. MONTAGUE

Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, in its Corporate capacity as an instrumentality of the United States, *Plaintiff,* v. THOMAS J. LEONARD, III, ET AL., *Defendants.*	Civil Action No. 91-1773-A

ORDER

For the reasons stated from the bench, it is hereby

ORDERED that the motion of the defendants Richard Blair, John Harrison, John Harn, Terry Light, and Light & Harrision, P.C., for summary judgment is granted, and they are dismissed as defendants in this action.

/S/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
May 1st, 1992

FILED
MAY 23 1994
OFFICE OF THE CLERK

No. 93-1483

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN E. HARRISON, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly remanded the case to allow the district court to determine whether Virginia's equitable estoppel doctrine tolled the statute of limitations in this case.

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In the Supreme Court of the United States

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JOHN E. HARRISON, ET AL., PETITIONERS

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 7 F.3d 396. The order of the district court (Pet. App. C1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1993. Petitions for rehearing were denied on December 21, 1993. Pet. App. B1. The petition for a writ of certiorari was filed on March 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of the activities of petitioners connected with McLean Savings & Loan Association. On July 8, 1988, the Federal Savings & Loan Insurance Corporation (FSLIC) was appointed receiver of that institution. In connection with a sale of the institution from the receiver to a third party, FSLIC acquired potential claims of the institution against petitioners and various other parties. The Federal Deposit Insurance Corporation (FDIC) succeeded to those claims in its capacity as manager of the FSLIC Resolution Fund when FSLIC was abolished in 1989. See Pet. App. A4-A5 & nn.2-3; 12 U.S.C. 1821a(a) (Supp. IV 1992); FDIC C.A. Br. 13-14.

2. In late 1991, the FDIC filed a complaint against petitioners alleging that they had breached duties that they owed to the institution, which had caused the institution to suffer monetary losses. In particular, the complaint alleged that, among other things, the institution improperly made unsecured loans to an unprofitable financial service subsidiary without securing the required regulatory approvals, and that in 1986 the board of directors of the institution approved a dividend for shareholders even though the institution's financial position at that time made the dividend inappropriate. The complaint also alleged that the challenged misconduct contributed to the failure of the institution. See Pet. App. A4-A5.

Some of the defendants (petitioners, as well as Blair, Harn, and Light) filed motions for summary judgment contending that the complaint was barred by the statute of limitations. At a hearing on the motions, the district court stated its view that the FDIC's claims would be barred if the limitations period provided by state law had

expired before appointment of a federal receiver. Applying Virginia law, the court concluded that the claims were governed by Virginia's one-year statute of limitations for personal actions. Because the last act or omission challenged by the FDIC occurred in April of 1987, and because a federal receiver was not appointed until July of 1988, the court concluded that the claims were barred. The court rejected the FDIC's argument that the adverse domination doctrine tolled the state limitations period, stating that "[t]his in my view is not the type of adverse domination that was present in [other cases where the doctrine was applied]." May 1, 1992, Tr. 81-83; C.A. App. 113-115. After the hearing, the district court entered an order granting the motions and dismissing the moving parties as defendants. Pet. App. C1.[1]

3. The court of appeals affirmed with respect to the district court's conclusion that the federal adverse domination doctrine did not toll the statute of limitations. Pet. App. A6-A8.[2] The court then considered the applicable state-law standard, and concluded that Virginia law would toll the statute of limitations if "the directors concealed their wrongdoing * * * during the period after the last act of alleged misconduct until the FDIC became receiver." *Id.* at A13. Accordingly, the court of appeals concluded that the district court had erred in "rejecting outright" the possibility of tolling with respect to the claims against petitioners. *Id.* at A12. The court of appeals remanded the case to the

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[1] The district court subsequently granted similar motions by other parties. Pet. App. 20a-22a, 23a-26a, 28a-30a, 31a-33a, *FDIC* v. *Cocke*, No. 93-1485.

[2] On March 21, 1994, we filed a petition for a writ of certiorari challenging that conclusion. *FDIC* v. *Cocke*, No. 93-1485.

district court to give it an opportunity "to determine the extent to which equitable estoppel tolls Virginia's one-year statute of limitations." *Id.* at A13.

ARGUMENT

Petitioners argue (Pet. 8-16) that the court of appeals erred in remanding the claims against petitioners to allow the district court to consider whether the FDIC can allege facts sufficient to support equitable estoppel under the appropriate Virginia common-law standard. They claim that the FDIC did not properly allege such facts when the case was in the district court in the first instance, and that *Celotex Corporation* v. *Catrett*, 477 U.S. 317 (1986), accordingly requires summary judgment against the claim of equitable estoppel.

Petitioners' argument misapprehends the procedural posture of the case. The court of appeals did not hold that the filings submitted by the FDIC when the case was in the district court were adequate to withstand a motion for summary judgment by petitioners. Rather, the court of appeals simply concluded as a matter of judicial administration that the appropriate course in light of that court's detailed articulation of the applicable legal standard—which was not available to the parties or the district court in the first instance—was to remand the matter to the district court to give the parties an opportunity to present to that court their arguments regarding the propriety of summary judgment under the newly articulated standard. If the FDIC fails to present adequate support for that claim—satisfying Fed. R. Civ. P. 56 as interpreted by this Court in *Celotex*—it will be appropriate for the district court to grant summary judgment on that issue at that time.

Nothing in this Court's opinion in *Celotex* is inconsistent with the propriety of that course of action.

Celotex is a case about the quantum of support necessary to survive a motion for summary judgment. See 477 U.S. at 322 (holding that "Rule 56(c) mandates the entry of summary judgment * * * against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). The question at issue here, by contrast, is whether the FDIC is entitled to an opportunity to satisfy the *Celotex* standard in light of the legal principles articulated by the court of appeals. We submit that it is. Cf. *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949) (per curiam) (error for court of appeals to grant summary judgment "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court").

It is not surprising that the filings offered by the FDIC in the first instance did not in terms address the questions that are relevant under the intentional concealment standard articulated by the court of appeals. At the time of those filings, the FDIC did not agree, and the district court had not held, that the FDIC was required to establish intentional concealment in order to secure tolling under Virginia's equitable estoppel doctrine. In the district court the FDIC offered submissions that demonstrated the existence of genuine issues of fact that were material under the FDIC's understanding of the applicable legal standard.[3] Now that the court of appeals

[3] We do not agree with petitioners' assertion that the FDIC submitted no materials in support of its claims for estoppel. As petitioners themselves concede (Pet. 11 n.6), the FDIC consistently has argued that tolling was appropriate based on "a form of non-intentional equitable estoppel." Furthermore, contrary to petitioners' assertions (Pet. 10-12), the FDIC's opposition to petitioners' motion for summary judgment does appear in the record as part of a motion for reconsideration that the FDIC filed in the

has clarified what the standard is, and has rejected the district court's unduly narrow approach, it is entirely appropriate to allow the FDIC an opportunity to demonstrate that the facts in this case entitle it to estoppel under the standard articulated by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Federal Deposit Insurance Corporation

MAY 1994

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district court on May 12, 1992 (Docket Entries 309 and 310, see C.A. App. 37).